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Wismettac Asian Foods, Inc. and Food, Industrial & Beverage Warehouse Union Local 630 International Brotherhood of Teamsters. Case 21–CA–267598

December 29, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

This is a refusal-to-bargain case in which the Respondent Wismettac Asian Foods, Inc. is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on October 13, 2020, by the Food, Industrial & Beverage Warehouse, Drivers and Clerical Employees Union Local 630, International Brotherhood of Teamsters (the Union), the General Counsel issued a complaint on November 2, 2020, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union following the Union's certification in Case 21–RC–204759. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On November 19, 2020, the General Counsel filed a Motion for Summary Judgment. On November 20, 2020,

the Board issued an Order Transferring the Proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response to the Notice to Show Cause on December 4, 2020.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain but contests the validity of the Union's certification of representative based on its contention, raised and rejected in the underlying representation proceeding, that the challenged ballots of eligible voters determinative to the outcome of the election should have been counted.¹

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor has it established any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.²

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a California corporation with an office and place of business located at

¹ In its answer, the Respondent admits the allegations in complaint par. 8, which alleges that the Union requested recognition and bargaining on May 4 and 8, and October 13, 2020, and that by letters dated May 13 and October 23, 2020, it advised the Union that it did not recognize the Union as the collective-bargaining representative of its employees. It denies the allegations in pars. 9 and 10, which allege, respectively, that since May 13, 2020, it has failed and refused to recognize and bargain collectively with the Union, and that by this conduct it has been failing and refusing to bargain in good faith with the Union in violation of Sec. 8(a)(5) and (1) of the Act. The Respondent also denies the allegation in par. 11 that this unfair labor practice affects commerce within the meaning of Sec. 2(6) and 2(7) of the Act. However, in its response to the Notice to Show Cause, the Respondent admits that in its October 23, 2020 correspondence, it informed the Union that it refused to bargain in order to test the Union's certification. See *Biewer Wisconsin Sawmill, Inc.*, 306 NLRB 732 (1992) (despite respondent's answer denying that it refused to bargain with union, its admission that it intended to test the union's certification was sufficient to establish a violation). Accordingly, we conclude that the Respondent's denials of the allegations in complaint pars. 9 through 11 do not raise any issue warranting a hearing.

The Respondent also argues in its response to the Notice to Show Cause that there are "disputed facts" as to whether it had an obligation to bargain on May 4 and May 8, 2020, as alleged in the complaint. It states that on about April 10, 2020, it conducted a layoff that the Union's May

4 and May 8 bargaining requests pertain to. It further states that there are two charges pending in the Region relevant to its duty to bargain on these dates: Case 21–CA–267253, which alleges a refusal to bargain in good faith regarding the April 10, 2020 layoff; and Case 21–CA–267665, which alleges a refusal to provide requested information regarding the layoff. The Respondent therefore requests that any order granting summary judgment allege only a refusal to bargain on October 23, 2020 while Cases 21–CA–267254 and 21–CA–267665 are pending. Notwithstanding the Respondent's request, we note that an employer's duty to bargain in good faith (and with it, the duty to provide requested relevant information) attaches with the issuance of the certification of representative. *NP Palace, LLC*, 368 NLRB No. 148, slip op. at 5 (2019) (citing *Didlake, Inc.*, 367 NLRB No. 125, slip op. at 1 fn. 2 (2019)). Accordingly, it is clear that the Respondent failed to satisfy its statutory obligation to bargain following the Union's March 26, 2020 certification, including the Union's May 4 and 8, 2020 bargaining requests.

The Respondent also denies par. 6 of the complaint, which sets forth the appropriate unit. However, the parties stipulated to the appropriateness of the unit in the underlying representation proceeding. Accordingly, the Respondent's denial of the appropriateness of the unit does not raise any litigable issue in this proceeding.

² The Respondent's request that the complaint be dismissed is therefore denied.

13409 Orden Drive, Santa Fe Springs, California (the Santa Fe Springs facility), has been engaged in the business of importation and distribution of Asian foods.

During the 12-month period ending on August 30, 2017, a representative period, the Respondent, in conducting its operations described above, purchased and received at its Santa Fe Springs facility goods valued in excess of \$50,000 directly from points located outside the State of California.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on February 6, 2018, the Union was certified on March 26, 2020, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

Included: All full-time and regular part-time class A, B, and C drivers, warehouse clerks, inventory control employees, assemblers/selectors, labelers, forklift drivers, warehouse employees, and leads in all departments, including the shipping and receiving department, state department, international export department, dry department, and cooler freezer department, and employees in the job classifications described herein who are supplied by temporary agencies, employed by the Employer at its facility currently located at 13409 Orden Drive, Santa Fe Springs, California.

Excluded: All other employees, GPO distribution coordinators, GPO central purchase clerks, central purchase clerks, logistics office clerks, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

On September 4, 2020, the Board denied the Respondent's request for review of the Union's certification. The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

By letters dated May 4 and 8, and October 13, 2020, emailed and mailed to the Respondent, the Union requested that the Respondent recognize and bargain collectively with it as the exclusive collective-bargaining representative of the unit. By emailed letters dated May 13 and October 23, 2020, the Respondent informed the Union that it did not recognize the Union as the collective-bargaining representative of the unit.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since May 4, 2020, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Wismettac Asian Foods, Inc., Santa Fe Springs, California, and its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the Food, Industrial & Beverage Warehouse, Drivers and Clerical Employees Union Local 630, International Brotherhood of Teamsters (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

Included: All full-time and regular part-time class A, B, and C drivers, warehouse clerks, inventory control employees, assemblers/selectors, labelers, forklift drivers, warehouse employees, and leads in all departments, including the shipping and receiving department, state department, international export department, dry department, and cooler freezer department, and employees in the job classifications described herein who are supplied by temporary agencies, employed by the Employer at its facility currently located at 13409 Orden Drive, Santa Fe Springs, California.

Excluded: All other employees, GPO distribution coordinators, GPO central purchase clerks, central purchase clerks, logistics office clerks, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

(b) Post at its facility in Santa Fe Springs, California copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees jointly employed by the Respondent at any time since May 4, 2020.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

³ If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the

Dated, Washington, D.C. December 29, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with the Food, Industrial & Beverage Warehouse, Drivers and Clerical Employees Union Local 630, International Brotherhood of Teamsters (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate bargaining unit:

Included: All full-time and regular part-time class A, B, and C drivers, warehouse clerks, inventory control employees, assemblers/selectors, labelers, forklift drivers, warehouse employees, and leads in all departments, including the shipping and receiving department, state department, international export department, dry department, and cooler freezer department, and employees in the job classifications described herein who are supplied by temporary agencies, employed by the Employer at its facility currently located at 13409 Orden Drive, Santa Fe Springs, California.

Excluded: All other employees, GPO distribution coordinators, GPO central purchase clerks, central purchase clerks, logistics office clerks, office clerical employees,

professional employees, managerial employees, guards, and supervisors as defined in the Act.

WISMETTAC ASIAN FOODS, INC.

The Board's decision can be found at www.nlr.gov/case/21-CA-267598 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

